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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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GTE TELEPHONE OPERATING COMPANIES)	Transmittal Nos. 873, 874,
Tariff F.C.C. No. 1)	893, 909, 910
)	
Video Channel Service at)	CC Docket No. 94-81
Cerritos, California)	

To: Chief, Common Carrier Bureau

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OPPOSITION TO GTE
MOTION FOR DECLARATORY RULING

APOLLO CABLEVISION, INC.

Edward P. Taptich
Kevin S. DiLallo
Anne M. Stamper
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(202) 408-7100

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SUMMARY

GTE's Motion seeks an unprecedented Commission intrusion into civil litigation reserved by statute to local courts. Having failed three times to have California courts terminate or delay Apollo's suit against GTE for breach of its earlier agreements with Apollo, GTE here asks the Commission to preempt the possibility of Apollo's recovering civil damages by declaring that any such monetary award would violate Section 203(c) of the Communications Act.

GTE provides no coherent, much less compelling, basis for such an extraordinary ruling. Under the parties' earlier agreement, GTE was to make available to Apollo the second half of the bandwidth on the Cerritos cable system facilities -- the bandwidth GTE reserved for Commission-approved cable experimentation in Cerritos, California during 1989-1994 -- at fair market rent. Failing properly to do so, GTE instead tariffed that bandwidth to its affiliate, GTE Service Corp., in 1994. Apollo filed a civil action in the Superior Court of California to enforce its contract rights, and to recover damages for lost business opportunity, for interference with business relationships, and for breaching both explicit non-competition contract provisions, as well as implied covenants of good faith and fair dealing.

In a truly bizarre theory, GTE here argues that, if Apollo recovers damages, those amounts will represent a prohibited "rebate" under Section 203(c) of the Act:

In essence, Apollo would pay the filed tariff rate for the lease of the excess bandwidth with one hand, and then receive a rebate from [GTE] in the form of damages with the other hand.

Motion, pp. 8-9. On its face, the concept makes no sense. Apollo isn't paying (and can't pay) any rate -- tariffed or otherwise -- for the second half of the bandwidth; GTE has dedicated its use by tariff to its affiliate. Even assuming a judicially-coerced damages payment to Apollo were made at the conclusion of litigation in the future, what would GTE be "rebating" -- prior payments by its affiliate? There is simply no coherent way to square GTE's position with either the words or the intent of Section 203(c).

GTE's further contention, that the "filed rate doctrine" supports the declaratory ruling requested, is no more persuasive. Apollo's civil suit does not challenge the tariff rates for GTE Service Corp.'s use of the bandwidth at issue. Neither does Apollo seek in court to reduce charges to itself under an otherwise-governing tariff by some calculation based on carrier wrongdoing. As a consequence, the "filed rate doctrine" is simply not involved here. See, e.g., Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984); U.S. Wats, Inc. v. American Tel. & Tel. Co., No. CIV.A 93-1038 (E.D.Pa. Apr. 5, 1994 (Lexis, Genfed Library, Dist. file)).

Ultimately, GTE's effort to enlist Commission help in opposing Apollo's civil suit defies Section 414 of the Communications Act, which reserved to state courts jurisdiction over such contract actions as Apollo's. Courts have repeatedly ruled that a variety of actions against Title II carriers, including claims for breach of contract, are not inconsistent with the Communications Act regulatory scheme. E.g., Cooperative Communications v.

American Tel. & Tel. Co., 867 F.Supp. 1511 (D.Utah 1994);
Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701 (1st
Cir. 1977); Kellerman v. MCI Telecommunications Corp., 493 N.E.2d
1045 (Ill. 1986), cert. denied, 479 U.S. 949 (1986); American
Inmate Phone Systems, Inc. v. Sprint Communications Co. Ltd.
Partnership, 787 F.Supp. 852 (N.D.Ill. 1992). And GTE has offered
no basis whatever for ignoring that clear Congressional jurisdic-
tional determination.

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To: Chief, Common Carrier Bureau

**OPPOSITION TO GTE
MOTION FOR DECLARATORY RULING**

Apollo CableVision, Inc. ("Apollo"), a party to the captioned proceedings, by its attorneys and pursuant to Section 1.45(a) of the Commission's Rules, opposes herewith the "Motion of GTE California Incorporated for Declaratory Ruling," filed February 8, 1995 ("Motion").

INTRODUCTION

Having thrice failed in the California courts to defeat Apollo's efforts to enforce its contract rights against GTE California, Incorporated ("GTE") and GTE Service Corp., the carrier now asks this Commission for unprecedented protection from civil liability: it seeks a declaration that the Communications Act bars Apollo in its California civil action from lawfully collecting damages for breach of contract. Repeating a position first pre-

sented to, and rejected last month by, California Superior Court Judge Barbara Lane,^{1/} GTE argues that any Apollo recovery of damages for GTE's failure to make available to Apollo additional bandwidth on the Cerritos system (as required by the parties' earlier contract) would represent a "rebate" prohibited by Section 203(c) of the Communications Act.^{2/} GTE requests a declaratory ruling to that effect by the Commission, in order to preempt Apollo's pursuit of civil remedies.

Some of GTE's arguments are merely repetitions of positions advanced earlier in defending its tariff filings, but interspersed with gratuitous factual assertions^{3/} and self-serving distortions.^{4/}

^{1/} See Attachment 1 hereto.

^{2/} Apollo's amended state court Complaint also seeks damages for GTE's breach of non-competition provisions in the GTE/Apollo agreements. (See Attachment 2, ¶¶ 13, 15-18, 21-22, 24.) GTE's Motion does not contend that Apollo's recovery of damages in that regard would violate Section 203.

^{3/} Slipped into GTE's Summary, for example, is a statement that "Apollo has further refused to pay the tariffed rates since expiration of the waiver." Nowhere in the body of its pleading does GTE explain or support that assertion. Suffice it to say, the principal tariff "rate" is a one-time \$4,042,702.00 "Single Payment Charge," paid by Apollo years ago. Other charges, including more than \$40,000 due Apollo by GTE, are currently the subject of discussion between the parties. See letter dated November 22, 1994, from Tom Robak, Apollo CableVision, Inc., to Michael Bolduc, GTE California, Incorporated.

GTE similarly refers to "a coordinate fifteen year lease" with GTE Service Corp. Motion, p. 2. As Apollo has pointed out earlier in these proceedings, GTE has yet to provide copies of that document, any amendments, and/or any predecessor agreements.

^{4/} For example, restating here its position that certain cited precedents required its challenged tariff filings, GTE now states that Apollo "concedes" the need for, GTE's tariffs. (Motion, p. 5.) However, the Apollo pleading quotation cited by GTE for support -- "Apollo does not argue here that a tariff must not be filed" -- is deceptively excerpted. The text from which it was wrenched was as follows:

In perhaps its most presumptuous (and unexplained) reach, GTE Telephone also cites the Supreme Court's recent decision in MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S.Ct. 2223 (1994), in support of the inapplicability of Sierra-Mobile. (D.C. at 33.) That decision -- which over-

[Continued on next page]

Other portions of its presentation appear to be gratuitous critiques of Apollo's civil suit pleadings.^{5/} And parts of the Motion are flatly inconsistent with positions GTE has taken in other forums.^{6/}

[Continued from previous page]

turned the Commission's forbearance from requiring tariff filings in certain circumstances -- has no relevance whatever in this proceeding. Apollo does not here argue that a tariff must not be filed; that matter, in the differing context of private-versus-common carriage issues, is being addressed in Apollo's Application for Review to the Commission. Rather, it is what the tariff filed must contain before it becomes effective that is at issue here.

Apollo Opposition to Direct Case, filed September 15, 1994, p. 9, n.7. Apollo has conceded neither the need for any tariff filing by GTE, nor the propriety of the particular tariff provisions GTE chose to file.

^{5/} See, e.g., Motion, p. 8:

[S]ince the alleged harm has already occurred, Apollo is not entitled to declaratory relief, but rather its appropriate prayer would be for contract damages resulting from its alleged loss [citing California state court cases]

^{6/} For example, in Apollo's state court proceeding, in these tariff proceedings, and in this Motion, GTE maintains that contract matters relating to the Cerritos tariffs are properly to be considered and resolved by the Commission. In its pending appeal to the U.S. Court of Appeals for the Ninth Circuit, however, GTE has recently argued otherwise. Seeking reversal of a District Court dismissal of its earlier action against Apollo (see pp. 6-7, below), GTE has argued that its contract-based civil action was not subject to FCC jurisdiction.

GTECA filed its complaint for declaratory judgment under the Communications Act and under its written contracts with Apollo on April 25, 1994 GTECA alleged that by the operation of the Communications Act and the FCC's rules, and more specifically by the FCC's assertion of Title II jurisdiction, the existing lease and maintenance agreements between Apollo and GTECA were abrogated by operation of law.

.

Here, there are no "unique" issues of tariff construction requiring the prior findings of the FCC on the issue.

GTE California, Incorporated v. Apollo CableVision, Inc., No. 94-56377 (9th Cir.), Appellant's Opening Brief, filed January 11, 1995, at 5, 32. (See excerpts in Attachment 3 hereto.)

Apollo will not here address such matters, other than to reserve its right to respond later, should they be deemed material. In considering GTE's substantive contentions, however, two preliminary matters should be clearly understood -- the course and status of Apollo's civil litigation, and the ultimate predicate for GTE's legal position. For these are matters central to the relief GTE here requests. And both are misportrayed in GTE's Motion.

**I. The Basis And Course Of
Apollo's Civil Litigation**

It is important first to understand the relationship of GTE's Motion to Apollo's civil suit. For even with its enormous resources focused on throttling this small family-owned business, GTE has repeatedly failed in local and state courts to defeat Apollo's efforts to obtain a judicial determination of its contract rights and remedies vis-à-vis the carrier. Against the backdrop of the civil litigation to date, GTE's Motion can readily be seen as an arrogant and improper effort to accomplish through the Commission what GTE has been unable to achieve in judicial forums -- to deny Apollo its day in court.

The January 22, 1987 Lease Agreement between the parties (Attachment 4) granted Apollo immediate use of one half of the bandwidth on the Cerritos system facilities. In addition, paragraph 21 of that contract also granted Apollo a right of first refusal on the remainder of the system bandwidth -- that portion to be used by GTE during the 5-year experimental period -- "should [it] become available." The terms and conditions of Apollo's utilizing that additional bandwidth would be those "mutually agreed

to by the parties" (emphasis added). As part of the interrelated changes to many of the GTE/Apollo/GTE Service agreements at the time, the June 1989 Amendment No. 2 to the Lease Agreement (Attachment 5) modified paragraph 21. The new paragraph 21(a) provided that, if the right of first refusal were exercised, "the use of any such increase in capacity [would be] at the then reasonable market rent for such bandwidth" (emphasis added). The contract change removed from GTE an ability to block Apollo's acquiring use of the bandwidth by simply refusing to agree on the amount of lease charges; it was agreed that external marketplace factors -- "then reasonable market rent" -- would now be the determinant.

As related in earlier pleadings, GTE notified Apollo in June of 1993 that it was concluding its experimentation in Cerritos, and that "Apollo CableVision, Inc. is hereby offered the right-of-first-refusal to use this capacity."^{2/} However, that "offer" included a proposed charge of \$95,265 per month. Apollo exercised its right of first refusal, but asserted that the proposed charge was not the "then reasonable market rent"; it submitted a consultant's valuation indicating a substantially lower figure, and suggested the parties take steps to obtain some third party determination of "reasonable market rent." As the Bureau is aware, GTE refused to consider any figure other than its own, terminated discussions, and purported to "withdraw" its June 1993 "offer."

^{2/} Letter dated June 29, 1993, from R. A. Cecil, GTE Telephone Operations, to Thomas Robak, Apollo CableVision.

On April 7, 1994, Apollo filed its contract action in the Superior Court of the State of California, County of Ventura, Apollo CableVision, Inc. v. GTE California, Incorporated et al., CIV 142800. In that suit, Apollo sought to enforce its contract right to utilize, at fair market rental, the second half of the bandwidth on the Cerritos system. Apollo's Complaint, which prior to the GTE tariff filings requested declaratory relief, was recently amended to include claims for damages resulting from the carrier's course of conduct. (See Attachment 2.)

When Apollo's suit was first filed, GTE's response was to lodge its disputed tariffs with the Commission on April 22, 1994, and to initiate its own suit in federal District Court three days later. GTE California, Incorporated v. Apollo CableVision, Inc. et al., CV-94 2689 SVW (EEx) (C.D.CA). GTE requested that court to declare that GTE's tariff filings abrogated all of the GTE/Apollo contracts (including, for example, ones for rent and system maintenance), that GTE's provision of service to Apollo was governed solely by the tariffs, that Apollo was required to comply with the tariffs, and that GTE had no obligation to compensate Apollo for costs growing out of its "tariff arrangement." In addition, GTE asked for "an injunction preventing Apollo . . . from commencing any civil action for damages against [GTE]." GTE Complaint filed April 25, 1994, at pp. 23, 24.

On August 1, 1994, in response to motions by Apollo and the Commission, the District Court dismissed GTE's suit for lack of jurisdiction, observing that "[n]o federal issue would be raised by a well-pleaded state complaint by Apollo against GTE." Order filed

August 1, 1994, at p. 3.^{8/} With respect to Apollo's state court action (which had been removed to the District Court entertaining GTE's suit), the District Court denied an FCC motion to dismiss Apollo's suit in an August 29, 1994 Order, and remanded the case to the state court. (Attachment 6.)

On October 4, 1994, GTE waded in once more, this time with a motion for judgment on the pleadings to the state court, again requesting a termination or delay of the case. Pleadings were exchanged, Apollo's complaint was amended, and oral argument was held on January 24, 1995, at the conclusion of which Ventura County Superior Court Judge Lane denied GTE's motion. (See Attachment 1.) A status conference was also scheduled for March 3, 1995, to establish, among other things, a timetable for discovery.

Perhaps increasingly concerned about its potential exposure, and willing to continue utilizing the Commission's processes as a civil litigation weapon,^{9/} GTE here asks the FCC to do what state and federal courts have been unwilling yet to do -- to deny Apollo the opportunity to vindicate what it believes its contract rights to be.

^{8/} GTE has appealed the court's decision to the Ninth Circuit Court of Appeals. GTE California, Incorporated v. Apollo CableVision, Inc., No. 94-56377 (9th Cir., filed September 2, 1994).

^{9/} Just as GTE used its 1994 tariff filings as a basis for trying to delay proceedings on Apollo's initial Complaint, Apollo now anticipates a GTE effort in state court to defer discovery pending Commission action on this Motion.

II. The Erroneous Predicate For GTE's Legal Position

Paragraph 19 of the January 22, 1987 Lease Agreement between GTE and Apollo provided, among other things, that if "the FCC claim[s] Title II jurisdiction over the service provided by [GTE], [Apollo] shall be subject to the rates, terms and conditions such agency may impose." (See Attachment 4.) Before the Commission and the courts, GTE has sought to avoid contract liability by characterizing both the fact of its tariff filings, and the carrier-chosen tariff contents, as "rates, terms and conditions" the Commission has "imposed" on GTE.

Consistent with that overall effort, GTE once more repeats its central predicate here: that in 1988 the Bureau, and in 1989 the Commission, "asserted Title II jurisdiction over" the GTE/Apollo contract relationship (Motion, pp. 2-3), and that its 1994 tariff filings were therefore compelled. Indeed, with each succeeding expression of that view, GTE's characterizations of the Commission's actions have become progressively more misleading. In this Motion (p. 7), GTE asserts that --

. . . the Commission determined in its 1988 and 1989 Orders that upon expiration of the [cross-ownership] waiver, GTECA's Cerritos video network would be fully subject to the express provisions of the Communications Act, including Section 203(a) and 203(c), the mandatory, non-discriminatory filed rate provision GTECA necessarily had to file mandatory tariffs . . . that then would govern the terms and conditions of the common carrier-user relationship among GTECA, Apollo and [the City of] Cerritos.

First, neither the Bureau in 1988,^{10/} nor the Commission in 1989,^{11/} uttered any decisional wording even remotely suggesting the applicability of all Title II requirements to the Cerritos project. To be sure, both rulings dealt with certifying the Cerritos cable system's construction and use under Section 214 of the Act.^{12/} But neither ruling referred to the future need to file tariffs of any sort. To the contrary. Even the need to include "illustrative tariffs" with the Section 214 application at the time was dispensed with.^{13/}

Second, no subsequent Staff or Commission decision directed the tariff filings GTE submitted in 1994. Indeed, in its November 1993 ruling rescinding GTE's earlier Section 214 authority and cross-ownership waiver, the Commission specifically eschewed prescribing any one of the various available methods of complying with applicable statutory and regulatory requirements:

^{10/} General Telephone Company of California, 3 F.C.C. Rcd. 2317 (C.C.Bur. 1988).

^{11/} General Telephone Company of California, 4 F.C.C. Rcd. 5693 (C.C.Bur. 1989).

^{12/} GTE's Section 214 filings with the Commission at the time specifically reserved "future argument -- not pressed here -- that the private lease arrangement with Apollo removes [GTE] from the classification of 'carrier' contained in Section 214." W-P-C-5927, filed February 6, 1987, pp. 3-4. See also W-P-C-6250, filed June 28, 1988, p. 3.

^{13/} At page 8 of its Section 214 application filed February 6, 1987 (W-P-C-5927), in lieu of an illustrative tariff, GTE stated:

The facilities applied for are not to be included in General's regulated telephone rate base, and are provided under an individualized lease whose rates, terms and conditions are fully set forth in the Lease Agreement [between GTE and Apollo]

No tariff was required. See General Telephone Company of California, supra, 3 F.C.C. Rcd. at 2317 (¶ 5), 2318 (¶ 10), n.39.

We do not mandate a specific remedy at this time, such as ordering GTECA to divest the Cerritos facilities or removing Apollo as the franchised cable operator in Cerritos as urged by waiver opponents. Rather, we simply direct GTECA to take steps necessary to achieve compliance with the telephone company/cable television cross-ownership restriction within 120 days from the date this decision is released. If GTECA's proposed action in this regard requires prior approval by the Commission (e.g., Section 214 certification to offer channel service or video dialtone service), GTECA must submit any necessary filings within 30 days of the release date of this decision in order to allow adequate time for public comment and Commission review. If GTECA's proposed action does not require such Commission certification, it shall inform us of this fact, and its plans, within 30 days of the release date of this decision.

General Telephone Company of California, 8 F.C.C. Rcd. 8178, 8182 (1993).

Third, GTE's implication that the 1989 issuance of a Section 214 authorization, without more, compelled its 1994 tariff filing is likewise untenable. In GTE's own words:

[T]he filing of a Section 214 application in no way prejudices the issue of whether the facilities can be provided on a non-common carrier basis. In fact, in several cases the Commission has approved the ultimate in non-tariffed offering -- the sale of the facilities to the cable operator.

Opposition to Petitions to Deny, filed April 16, 1987, fn. 24. See also id. at pp. 27-30.^{14/}

^{14/} And see id. at pp. 25-26:

Petitioners seek dismissal of the [GTE Section 214] Application because General has proposed to offer the facilities to Apollo under lease rather than by tariff. Contrary to Petitioners' assertions, however, General has not ignored the "black letter" law in this area. General does not dispute that when providing common carrier services to customers/users, a carrier must offer service by tariff. In this case, however, as explained in the Application, General is not proposing to offer a common carrier service to Apollo, but rather is proposing a private carriage offering.

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Finally, GTE's repeated claims that it had no choice but to file tariffs which would abrogate its contracts with Apollo are knowingly untrue. As noted above, the Commission's November 1993 ruling did not dictate a tariff filing, but directed GTE to comply with applicable rules and statutes. And at the time, GTE directly acknowledged that compliance could be achieved in a number of different ways, of which filing tariffs was but one. In its November 26, 1993 "Motion of GTE California Incorporated for a Stay Pending Judicial Review" (at pp. 8-12), the carrier specifically recognized that "the [November 1994] Order does not now mandate [GTE's] adoption of any specific compliance remedy," and discussed available non-tariffing courses in arguing irreparable injury to itself. Indeed, a Declaration of GTE's Director-Regulatory Matters submitted in support of GTE's stay motion acknowledged and weighed the business pros and cons of various alternatives to tariff filings. (Attachment 7.) Nowhere did that Declaration -- or GTE's pleading

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Under these circumstances, a lease arrangement is permissible and appropriate.

Although the Commission may not previously have considered the leasing of broadband facilities by a telephone company to a cable operator on a non-common carrier basis within the Company's service area, General believes that its offering meets the standard accepted for other non-common carrier services. Specifically, there is no holding out of facilities to the public . . . [Footnotes omitted.]

Apollo has elsewhere explained in detail that a grant of Section 214 certification does not, in itself, predetermine whether tariffs will be required for the services to be provided over the certificated facilities. See Apollo's Petition to Reject or Suspend Tariffs, filed May 17, 1994, at pp. 14-19; Application for Review, filed August 1, 1994, at pp. 6-12; Letter dated July 8, 1994, from James S. Blaszak to David Nall, FCC, Memorandum of Law, at pp. 3-10. See also, e.g., Lightnet, 58 R.R.2d 182 (1985).

-- suggest that filing tariffs had been directed by the Commission, or was compelled as a matter of law.

In sum, GTE's repeated efforts to avoid the civil contract consequences of its arbitrary actions have been based on its claim that it had no choice but to file tariffs -- that the Commission had "asserted Title II jurisdiction" over the Cerritos facilities and had thereby compelled, under Section 203 of the Act, the submission of GTE's challenged tariffs. The facts are otherwise. And GTE knows it. The carrier made a business choice to file tariffs; there was no regulatory exclusion of other available alternatives. GTE made a further business decision to fashion those tariffs in a manner inconsistent with the terms of its contracts with Apollo; there was no agency directive concerning tariff content. The carrier now squeamishly faces the legal consequences of its business choices. GTE's arguments here must be viewed against that backdrop.

ARGUMENT

I. GTE Has Failed To Establish The Propriety Of Issuing A Declaratory Ruling Here

Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, provides that the Commission may "issue a declaratory ruling terminating a controversy or removing uncertainty." In its Motion, GTE summarily asserts that "a controversy has arisen" because (in its view) Apollo's civil damage suit "constitutes an unlawful preference or rebate under Section 203 of the Communications Act." Motion, p. 5. An agency declaration is needed, GTE asserts, "to remove any uncertainty that Apollo's request for damages in its

state court action violates the stringent rate regulations of Title II of the Communications Act." Id. In Apollo's view, GTE has failed entirely to show that any declaratory ruling would be appropriate here.

The Commission has made clear that it "will not issue declaratory rulings to resolve abstract questions of law." Harry Furgatch, 62 R.R.2d 930, 931 (1987). Moreover, even where a specific dispute subject to its jurisdiction exists, the Commission will not issue declaratory rulings unless "the facts are clearly developed and undisputed." American Network, Inc., 65 R.R.2d 1519, 1523 (C.C.Bur. 1988).

In this case, GTE essentially seeks an agency ruling that, where a carrier has tarified particular services, civil recovery of damages from that carrier based on contracts related in any way to the filed tariffs is barred by Section 203(c) of the Act. Aside from being grossly wrong,^{15/} such a determination would be precisely the type of "abstract question of law" the Commission has recognized to be inappropriate for declaratory ruling. Indeed, the Commission's undertaking to consider an issue of such broad implications for carriers and customers alike without a full opportunity for public participation would be an abuse of agency discretion, even if the exercise were otherwise proper. And the singular circumstances of the Cerritos dispute are hardly an appropriate basis for any such gratuitous, broadscale undertaking.

^{15/} For example, GTE's overreaching claim (Motion, p. 5) that "[a]ny variance from the tariffs now in effect (albeit subject to investigation) would result in unjust discrimination" has most recently been rejected in U.S. Wats v. American Tel. & Tel. Co., discussed below at pp. 21-23.

Even viewing the civil dispute here more narrowly, the facts are not yet "clearly developed and undisputed." Indeed, the parties' August-September, 1994 submissions to the Commission in connection with GTE Transmittal No. 873 -- which touch only part of the contract background and relationships between the parties -- alone confirm the extent of factual disagreement between GTE and Apollo. It is the discovery and trial elements of civil litigation which will "develop" all of the relevant facts, and which will resolve the parties' disputes concerning those facts. GTE's effective invitation to the Commission to insinuate itself into that process through the use of its declaratory ruling powers should be summarily rejected.

**II. The Commission Has No Authority
To Grant The Requested Relief**

**A. Section 414 of the Communications
Act Reserves Apollo's Contract
Claim For State Court Resolution**

Section 414 of the Act protects certain state common law claims from preemption by the Communications Act:

Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

47 U.S.C. § 414. Several courts have interpreted the intended function of this "savings clause" as follows:

Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunications services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.

E.g., Cooperative Communications v. AT&T Corp., 867 F.Supp. 1511, 1516 (D.Utah 1994), quoting Financial Planning Inst., Inc. v. American Tel. & Tel. Co., 788 F.Supp 75, 77 (D.Mass. 1992).

In situations involving Title II services, courts have held that Section 414 "[preserves] causes of action for breaches of duties distinguishable from those created under the Act, such as breach of contract claims." Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701, 708 (1st Cir. 1977). See also Kaplan v. ITT-U.S. Transmission Systems, Inc., 589 F.Supp. 729, 736 (E.D.N.Y. 1984) (customer complaints of breach of agreement, fraud, and misrepresentation against long-distance carrier for not disclosing unanswered call charge); Cooperative Communications, Inc., *supra*, 867 F.Supp. at 1516 (customer complaint against long-distance service provider for intentional interference with prospective economic relations, interference with contract, business disparagement, etc.); Kellerman v. MCI Telecommunications Corp., 493 N.E.2d 1045, 1051 (Ill. 1986), cert. denied, 479 U.S. 949 (1986) (subscriber breach of contract and common law fraud claims against long distance provider for alleged fraudulent advertising).

Other courts have refined the Comtronics interpretation of Section 414 by holding that the statute preserves state law causes of action, such as breach of contract, fraud, and deceptive practices, as long as they also do not interfere with the Federal government's authority over interstate telephone charges or services, do not conflict with provisions of the Act, and do not interfere with Congress' regulatory scheme. Bruss Co. v. Allnet Communication Services, Inc., 606 F.Supp. 401, 411 (N.D.Ill. 1985) (subscriber

claim against long-distance provider for alleged overcharges); Kellerman v. MCI Telecommunications Corp., *supra*, 493 N.E.2d at 1051. See also, In re Long Distance Telecommunications Litigation v. Kaplan, 831 F.2d 627, 634 (6th Cir. 1987) (customer claims for fraud and deceit against long distance telephone companies).^{16/}

As indicated in the previous citations, Section 414 has been directly applied to contract disputes between carriers and customers relating to tariffed services. For example, the court in American Inmate Phone Systems, Inc. v. Sprint Communications Co. Ltd. Partnership, 787 F.Supp. 852 (N.D.Ill. 1992), held that a telephone subscriber's state-law claims for breach of an oral contract for long distance service, and violation of state fraud and deceptive business practices acts, were not preempted by federal law.^{17/} The court dismissed the long distance carrier's argument

^{16/} By applying Section 414 in this manner, these courts have declined to follow Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968), which held that the federal district court "had jurisdiction over [a customer's] actions for damages resulting from negligence and breach of contract in the rendition of interstate telephone service." *Id.*, 391 F.2d at 489 (emphasis added). The courts which explicitly rejected Ivy reasoned that Ivy was not applicable to the state common law claims in question because Ivy did not consider Section 414, and because Ivy predates relevant Supreme Court preemption analysis. American Inmate Phone Systems, Inc. v. Sprint Communications Co. Ltd. Partnership, 787 F.Supp. 852, 856-58 (N.D.Ill. 1992); Kellerman v. MCI Telecommunications Corp., *supra*, 493 N.E.2d at 1051; Bruss Company, *supra*, 606 F.Supp. at 410; Cooperative Communications, Inc., *supra*, 867 F.Supp. at 1515. Other courts did not apply Ivy because the state common-law claims in their cases did not relate to carrier rates or services. In re Long Distance Telecommunications Litigation, *supra*, 831 F.2d at 634, referencing Kellerman v. MCI Telecommunications Corp., *supra*. Notwithstanding the fact that many courts have found valid and significant reasons not to apply Ivy, Apollo's breach of contract claim does not implicate the Ivy holding because it does not involve GTE's filed tariff rates or services to GTE Service Corp.

^{17/} 787 F.Supp. at 858-59. The terms of the alleged agreement stated that the carrier would waive all phone card surcharges to subscriber, the carrier would provide the subscriber with forward discounting, the carrier would introduce procedures to reduce phone fraud, and the carrier would provide a written agreement including these terms. *Id.* at 853-54.

that the complaint actually alleged a breach of a tariff that incorporated a subsequent written contract. Id. at 855. The court found that the subscriber was not alleging that the terms of the oral contract were unjust and unreasonable, or that the carrier breached its statutory duty to act in a just and reasonable manner. Rather, the court found that the subscriber was merely alleging that the carrier failed to abide by an oral contract the parties entered into, a contract imposing duties different than those found in the Communications Act. Id. at 857.

Because Apollo's civil action does not challenge the reasonableness of the terms of GTE's pending tariffs, does not challenge GTE's compliance with its duty to act in a just and reasonable manner under the Communications Act, and does not involve the quality of GTE's service, Section 414 bars the Commission from taking the action requested here -- one which would plainly "abridge or alter" Apollo's contract remedies under California law.

B. GTE's Efforts to Distinguish Regents of Georgia v. Carroll Are Inconsequential

As noted earlier, in late August, 1994, GTE's federal court suit was dismissed. In its ruling, the District Court, citing Regents of Georgia v. Carroll, 338 U.S. 586 (1950), noted "that some contract claims between an FCC licensee and third parties are not precluded by related FCC action." (See Attachment 6, p. 3.) Sensitive to the Commission's lack of authority to grant the relief it here requests -- and as if to answer the court -- GTE seeks to distinguish the Carroll case on the grounds that the Supreme Court's ruling dealt only with Commission authority under Title

III, and not under "the stringent provisions of Title II." Motion, p. 13. Two comments are warranted in response.

First, while the facts of Carroll involved a contract by a broadcast licensee rather than a certificated common carrier, the Court did not, explicitly or implicitly, limit the applicability of its holding to Title III matters. Nor did the Court sanction Commission authority over the private contracts and business of common carriers. Rather than restricting its analysis solely to Title III provisions, the Court considered the Communications Act as a whole, and focused on the Commission's authority with respect to the contract dispute. 338 U.S. at 594, 600. And its following observation, although in the context of agency powers under Section 303(r) of the Act, is directly pertinent:

The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.

Id. at 602. So here, while certain responsibilities may be imposed on GTE as a regulated carrier under Title II, those responsibilities do not vitiate its contract responsibilities to Apollo, particularly where damages for breaching those responsibilities do not directly impinge on the Commission's regulatory scheme.

Second, whether there are factual distinctions between Carroll and this case is immaterial in any event. Section 414 of the Act extends to all aspects of Commission jurisdiction and regulation, including those pursuant to either Title II or Title III.

III. GTE's Assertion That Contract Damages Would Violate Section 203(c) of the Act is Frivolous

Section 203(c)(2) of the Communications Act, 47 U.S.C.

§ 203(c)(2), provides, in pertinent part:

No carrier . . . shall engage or participate in [interstate and foreign wire or radio] communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall . . . (2) refund or remit by any means or device any portion of the charges so specified, . . .

The only direct expression of GTE's position in this regard is found at pages 8-9 of its Motion, where the carrier argues that Apollo's recovering civil contract damages would violate the quoted portion of the Act:

In essence, Apollo would pay the filed tariff rate for the lease of the excess bandwidth with one hand, and then receive a rebate from [GTE] in the form of damages with the other hand. This transaction, placing Apollo in the position it occupied prior to expiration of the [cross-ownership] waiver and the effectiveness of the two tariffs, would clearly constitute the type of unlawful preference that Section 203 precisely sought to forbid^{18/}

^{18/} Seemingly to stress the potential threat Apollo's suit represents to the entire structure of FCC rate supervision, GTE highlights "[t]he insidiousness of Apollo's [civil suit] claim":

Were Apollo to succeed, any Title II common carrier could enter into private contracts with customers at other than the tariffed rate, and then effectuate a rebate by sustaining a state court judgment on a breach of contract theory. Because this would occur in a state judicial forum, the action would be outside of the Commission's regulatory scrutiny and that of the public. If the state court were to award damages to Apollo, and GTECA was required to satisfy such a judgment (as Apollo demands), this result would not only allow but incent carrier-customer transactions to be governed by secretly negotiated rates, rather than publicly filed rates as mandated by the Communications Act.

Motion, p. 9. In other words, a Commission failure here to interfere with Apollo's state court suit would "incent" other common carriers to enter into agreements with customers for "secretly-negotiated" lower-than-tariff

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The virtually surreal nature of GTE's assertions make direct response difficult. First, the bandwidth at issue is not now available to Apollo either by lease or by tariff; thus, Apollo cannot "pay [a] filed tariff rate for the lease of the excess bandwidth with one hand." At present, by virtue of GTE's actions, and under its current tariffs, that bandwidth is available exclusively to its affiliate, GTE Service Corp.^{19/}

Second, in no rational way could a future recovery of damages by Apollo be deemed a "rebate" from GTE. GTE's payment of damages would be judicially coerced, not voluntary, as the plain words of the statute mean. Moreover, since Apollo has paid nothing yet for the bandwidth at issue, there are no Apollo-paid (or owing) tariff "charges" which GTE could "refund or remit."

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rates, and then conspire to accomplish those lesser charges by acquiescing in customer civil suits for damages. Apollo demurs.

^{19/} Transmittal No. 909 -- suspended for one day and set for investigation in the Bureau's September 9, 1994 Order (DA 94-988) -- specifies rates and charges to "GTE Service Corporation" for use of "39 channels of the Video Channel Services coaxial network in Cerritos, California." GTE Tariff FCC No. 1, Section 18.4.1(B). GTE's September 9 Transmittal letter explains that "this filing reinstates rates and charges for Video Channel Service for GTE Service Corporation" (emphasis added). The Bureau's September 1994 Order viewed the filing to be a resubmission of GTE's earlier-rejected proposal to tariff service "to an affiliated company, GTE Service Corporation." As initially filed, the tariff (then Transmittal No. 874) "establishe[d] rates and charges . . . to meet the specific needs of GTE Service Corporation," and was said to correct GTE's "existing video transport agreement with Service Corp. from a private contractual arrangement to a tariffed common carrier service." GTE Transmittal letter dated April 22, 1994, p. 1 (emphasis added). The "Description and Justification" which accompanied Transmittal No. 874 similarly described "the accompanying tariff [as] establishing Video Channel Service to meet the specific needs of GTE Service Corporation" (p. 1; emphasis added). Following the Bureau's September 1994 Order concerning Transmittal No. 909, GTE again described its filing as a reinstatement of "the tariff submitted for [its] provision of video channel service to Service Corp. in Transmittal No. 874." Comments of GTE, filed September 15, 1994, p. 4 (emphasis added).